LIBRARY
SUPREME COURT U.S.

FILED
JUN 21 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1112~~ 212

THOMAS E. ANDERSON, et al.,

PETITIONERS,

v.

THE UNITED STATES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

HERBERT S. THATCHER,
DONALD M. MURTHA,
1909 Tower Building,
Washington 5, D. C.,
Attorneys for Petitioners.

INDEX

n Below 1

iction 2

on Presented 2

es and Regulations Involved 2

ent 11

s for Granting the Writ 13

The statutory language is clear and unambiguous; it requires compensation for scheme study work .. 15

(a) The provisions of the statute 15

(b) The legislative history of the Act supports the claim of the petitioners 17

Scheme study activities meet all of criteria of "work" 19

Inaction on the part of Congress does not constitute a basis for interpreting a statute contrary to the plain implication of its language 24

The difficulties of administration do not serve as a sound basis for disregarding statutory requirements 26

sion 27

dix A 28

dix B 33

Table of Cases Cited

n v. Holly Hills, 322 U.S. 607, 88 L. ed. 1488, 64 t. 1215 ..... 17, 27

ean Newspaper Guild v. Republican Publishing Co., F. 2d 943 26

on v. Mt. Clemens Pottery Co., 328 U.S. 680 14

v. Georgia Power & Light Co., 2 WH. Cases 486 .. 26

...y v. United States, 131 C. Cls. 776 20

...sco v. Walling, 324 U.S. 244, 89 L. ed. 921, 65 S. Ct. 5 ..... 25, 26

...hakoff v. California Shipbuilding Corp., 63 F. Supp. 9 26

...ill Ridge Coal Corp. v. United Mine Workers, 325 S. 161, 89 L. ed. 1534, 65 S. Ct. 1063 ..... 14, 20

...omb v. Homeworkers' Handicraft Cooperative, 176 2d 633 26

...hel v. King Packing Co., 350 U.S. 260 23

...r of Railway Conductors of America, et al., v. Swann, al., 329 U.S. 520, 529, 67 S. Ct. 405, 410 25

...sa Shosen Kaisha Line v. United States, 300 U.S. 98, L. ed. 532, 57 S. Ct. 356 17

...rnight Motor Transportation v. Missel, 316 U.S. 572, 5 L. ed. 1682, 62 S. Ct. 1216 20

...herford Food Corp. v. McComb, 331 U.S. 722, 91 L. ed. 772, 67 S. Ct. 1473 20

...dmore v. Swift, 323 U.S. 134 20

...ner v. Mitchell, 350 U.S. 247 23

...nessee Coal, Iron & R.R. Co. v. Muscoda, 321 U.S. 90 ..... 14, 20

...ted States v. Darby Lumber Co., 312 U.S. 100, 85 L. ed. 05 20

...ted States v. First National Bank, 234 U.S. 245, 58 . ed. 1298, 34 S. Ct. 846 16

...ted States v. Shreveport Grain & Elevator, 287 U.S. 7, 77 L. ed. 175, 53 S. Ct. 42 17

...gner v. Mitchell (CCA 2), 217 F. 2d 303, cert. denied 48 U.S. 964 26

...lling v. American Needlecrafts, Inc., 139 F. 2d 60 26

...lling v. Twyeffort, Inc. (CCA 2), 158 F. 2d 944, cert. en. 331 U.S. 851 26

...ntock v. Armour & Co., 323 U.S. 126 20

...nsberg v. United States, 120 Ct. Cls. 511 20

Statutes

Act of June 28, 1940, ch. 440, 54 Stat. 676, Title I, Sec. 5(a) 19

Act of July 6, 1945, 59 Stat. 435—

Sec. 1 (39 U.S.C. 851) 2

Sec. 2 (39 U.S.C. 852) 2, 15

Sec. 3 (39 U.S.C. 853) 3, 15

Sec. 4 (39 U.S.C. 854) 4, 15, 22

Sec. 11 (39 U.S.C. 861 (a)) 5

Employees Pay Act of 1945, ch. 212, Title II, Sec. 201, 59 Stat. 296 (5 U.S.C. 911) 19

Fair Labor Standards Act of 1938, ch. 676, 3rd Sess., 75th Cong. (29 U.S.C. 201, et seq.) 19, 20

Federal Employees Act of 1945 ..... 18, 19

Walsh-Healy Public Contracts Act, ch. 881, 49 Stat. 2036 (41 U.S.C. 35, et seq.) 19

War Overtime Pay Act of 1943 19

Miscellaneous

Joseph F. Gartland, on S. 908 and H. R. 3035, U.S. Senate, 79th Cong., 1st Sess. 18

House Report No. 726, 79th Cong., 1st Sess. 18

Manual of Instructions for Postal Personnel [1948], Ch. III, Art. 55 55

Postal Manual Regulations, Part 333 9

Secretary of Labor—Interpretative Bulletin Part 785 (a) 26

Senate Hearings on S. 807, 79th Cong., 1st Sess., p. 15 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.....

THOMAS E. ANDERSON, et al.,

PETITIONERS,

v.

THE UNITED STATES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case May 8, 1957.

OPINION BELOW

The opinion of the Court of Claims (R. 147) is set forth in Appendix A, p. 28 of this petition.

JURISDICTION

The judgment of the Court of Claims was entered May 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether scheme study work performed after hours by employees of the Post Office Department engaged in distributing mail, which work is required and controlled by the department and constitutes an integral and indispensable part of the business of mail distribution, constitutes "work" or "employment" or "service" within the meaning of the statute requiring extra pay for overtime work, employment, or service.

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Act of July 6, 1945, 59 Stat. 435 (39 U.S.C. 851) provides:

> The term "employees" wherever used in this chapter shall include officers, supervisors, special-delivery messengers in offices of the first class, and all other employees paid from field appropriations of the Postal Service, other than postmasters, skilled-trades employees of the mail-equipment shops, job cleaners in first- and second-class post offices, and employees who are paid on a fee or contract basis.

Section 2 of the Act of July 6, 1945, as amended, 59 Stat. 435 (39 U.S.C. 852) provides:

> Employees shall be required to work not more than eight hours a day except as provided in section 854 of this title. The eight hours of service shall not extend over a longer period than ten consecutive hours, and the schedules of duty of the employees shall be regulated accordingly: *Pro-*

vided, That the provisions of this section shall not apply to employees of the Railway Mail Service and the Air Mail Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; employees in third-class post offices; employees paid on an hourly basis; employees not in the automatic or additional annual salary grades; and carriers in the Village Delivery Service: *Provided further*, That any classified substitute employee who reports for duty at any post office or other postal unit in compliance with an official order shall be employed not less than two hours following the hour at which such classified substitute employee is ordered to report. Employment in any branch of the Postal Service will be construed as compliance with this proviso.

Section 3 of the Act of July 6, 1945, as amended, 59 Stat. 435 (39 U.S.C. 853) provides:

(a) When the needs of the service require employees to perform service on Saturdays, Sundays, or holidays, such employees shall be allowed compensatory time for such service on one day within five working days next succeeding the Saturday or Sunday and within thirty days next succeeding the holiday.

(b) If the service so performed on Saturdays and Sundays is less than eight hours, such service may, in the discretion of the Postmaster General, be carried forward and combined with similar service performed on other Saturdays and Sundays, and such employees may be allowed compensatory time for such combined service or any part thereof at any time, except that, whenever at least eight hours of such service has been accumulated, such employees shall be allowed eight hours com-

pensatory time on one day within five working days next succeeding the Saturday or Sunday on which the total accumulated service was at least eight hours.

(c) The Postmaster General may, if the exigencies of the service require, authorize the payment of overtime to employees other than supervisory employees whose base salaries, exclusive of longevity salary, are more than $4,970 per annum, for services performed on Saturdays, Sundays, and Christmas Day during the month of December, in lieu of compensatory time.

(d) Supervisory employees shall be allowed compensatory time for services performed in excess of eight hours per day, and those whose base salaries, exclusive of longevity salary, are more than $4,970 per annum shall be allowed compensatory time for services performed on Saturdays, Sundays, and on Christmas Day during the month of December, within one hundred and eighty days from the days such service was performed.

(e) The provisions of this section shall not apply to employees in the Postal Transportation Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; clerks in third-class post offices; and employees paid on an hourly basis.

Section 4 of the Act of July 6, 1945, 59 Stat. 435 (39 U.S.C. 854) provides:

In emergencies or if the needs of the service require, employees may be employed in excess of eight hours per day and for such overtime service they shall be paid on the basis of 150 per centum of the annual rate of pay received by such em-

ployees. In computing compensation for such overtime employment, the annual salary or compensation for such employees shall be divided by two thousand and eighty, the number of working hours in a year. The quotient thus obtained will be the base hourly compensation and one and one-half times that amount will be the hourly rate of overtime pay: *Provided*, That the provisions of this section shall not apply to employees of the Railway Mail Service and the Air Mail Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; employees paid on an hourly basis, and supervisor employees.

Section 11 (a) of the Act of July 6, 1945, 59 Stat. 435 (39 U.S.C. 861 (a)) provides:

> Employees shall be divided into grades and shall receive basic annual salaries or hourly rates of pay.
> • • •

Chapter III, Art. 55 of the Manual of Instructions for Postal Personnel [1948] provides:

> CASE EXAMINATIONS
>
> 55. Case examinations shall be given on official time as follows:
>
> (a) At offices of the first class having a superintendent of mails, all clerks regularly assigned to the distribution of mail, either incoming or outgoing, and all substitute clerks, shall be examined yearly on the distribution schemes in use in their offices. Such examinations shall be conducted by the superintendent of mails. On outgoing mail a scheme comprises a State or section of a State, in accordance with divisions made by the Railway Mail Service. On incoming mail a scheme com-

prises a city primary, a city secondary, or a station distribution. Where a State or city is divided into two or more sections, one section will constitute a complete scheme for examination purposes. Complete city schemes of more than 1,200 cards shall be divided into sections, each section to contain not less than 600 cards.

(b) At city delivery offices all substitute clerks should be assigned to and must qualify on the city scheme, and all clerks in the mailing division, other than those regularly assigned to scheme distribution and those needed as reserves for such scheme distribution of outgoing mail, must qualify on the city delivery scheme. A scheme assignment on the distribution of outgoing mail is the State or States the mail for which a clerk may be required to distribute. An assignment on incoming mail may embrace a primary distribution, and one or two section or station distributions, or, where there is no primary, two or three section or station distributions. An assignment may embrace both incoming and outgoing distribution. Upon being given an assignment, a clerk shall as a rule be required to qualify on one scheme each 3 months until he shall have covered his entire assignment, after which he shall be required to pass at least one examination annually, provided that an entire assignment must be covered within 3 years. At offices where the needs of the service demand, additional examinations may be required. At offices having a superintendent of mails, in cases where a stand-point scheme is regularly used the examination should be based thereon if feasible, the scheme to be made up by the superintendent of mails and approved by the general superintendent or district superintendent of the Railway Mail Service.

(c) Clerks in the registry section shall qualify on either the outgoing or city scheme, their assignment to govern the examination given. Nondistribution employees whose services are not required or utilized in a distributing capacity at seasonal or peak periods of the day, month, or year shall not be required to qualify or pass examination on any scheme. However, where the services of such employees are utilized and where it is practicable to use their services in distribution work during seasonal or peak periods of the day, month, or year, they shall be required to qualify on the city primary or part of the city delivery scheme.

(d) Clerks not called upon to perform any distribution except during the Christmas period should be given a simple primary scheme of distribution, such as is furnished temporary employees for study incident to handling Christmas mails. They should be furnished with such primary schemes in November and be required to qualify thereon about December 1 of each year. These employees should be relieved of any other scheme requirments during the remainder of the year.

(e) No clerk shall be examined on any scheme that he is not required to use regularly, either daily, monthly, or at seasonal or peak periods; except that this shall not apply to clerks or substitutes who may be preparing for an assignment. No clerk shall be examined more than once each year on a scheme on which he has qualified.

(f) At first-class offices not having a superintendent of mails, all clerks, including assistant postmasters who distribute mail 1 hour or more daily, in accordance with a general scheme prepared by the Railway Mail Service, or who from

time to time are assigned to assist in such distribution during rush hours or periods of congestion, shall be examined once yearly on the distribution schemes in use in their offices. Such examinations on dispatching schemes shall be conducted by district superintendents of the Railway Mail Service, and on city schemes by the postmaster or assistant postmaster.

(g) At second-class offices examinations on dispatching schemes will be conducted by district superintendents of the Railway Mail Service when conditions indicate that clerks, including assistant postmasters, who distribute mail 1 hour or more daily, in accordance with a general scheme prepared by the Railway Mail Service, or who from time to time are assigned to assist in such distribution during rush hours or periods of congestion, should have some knowledge of dispatching scheme distribution. Clerks shall be examined once yearly on the schemes at the times designated by the district superintendents. Examinations on city schemes, if necessary, shall be conducted by the postmaster or assistant postmaster.

(h) A record of 95 percent and an average of not less than 16 cards correctly thrown per minute on case examinations shall be required. Clerks making lower grades shall be demerited in accordance with the schedule shown in the "Postal Service Rating System" and reexamined, and those failing upon the fourth trial may be considered for removal. Clerks who fail to qualify should, as a rule, be allowed 30 days in which to prepare for reexamination. Clerks who fail to report for examination on the date scheduled should be demerited and rescheduled without further opportunity to prepare for examination.

(i) The speed and percentage attained in case examinations shall be recorded separately on Form 3989, in duplicate, the carbon copy of the form being sent to the employee and the original being filed in the employee's individual record jacket.

(j) Clerks past 55 years of age, or who have been in the service for 25 years, are exempt from examinations, but any distributor who permits himself to become inefficient in the performance of his duties shall be required to qualify again by passing a satisfactory scheme examination.

(k) Postmasters shall see that there are a sufficient number of trained distributors available to meet any situation which may arise, and good judgment should be exercised not to require clerks to qualify on schemes which they will not be required to use.

(l) Careful attention should be given to the training of substitutes to become good distributors, and they shall not be exempt from examinations.

Appendix A, Art. 59 of the Manual of Instructions for Postal Personnel [1948] is the schedule of demerits for "Offenses Against Discipline and General Delinquencies." In pertinent part, it provides:

Case Examinations

Failure to report when due, failure to be prepared to qualify on first attempt	50
Second failure	75
Third failure	125

(Failure on more than three occasions may result in charges looking to removal.)

The following excerpts are from Regulation Part 333 of the Postal Manual:

333.2 Schedule for Distributing

21 Outgoing Mail

.211 *First Class.* Primary distribution must be completed within 15 minutes after the time shown in the postmark. Secondary distribution must be completed within 1 hour after the time shown in the postmark, except that mail for which there is no immediate dispatch may be excluded from this requirement *provided* the first dispatch is connected.

22 Incoming Mail

.221 *First Class.* Distribute immediately on arrival. Organize so as to effect delivery of greatest possible volume at earliest time practicable.

333.13 General Schemes

.131 *Definition*

A general scheme is a pattern of distribution of mail for a State or section of a State showing the RPO, railroad, HPO, star route, or other supply by which a post office receives its mail.

.132 *Scheme and Schedule Corrections*

Corrections to schemes and schedules and information concerning the distribution and dispatch of mail are published in general orders of the Postal Transportation Service.

.133 *Use*

(a) Mail must be distributed and dispatched in accordance with official schemes, schedules, and general and special orders. First- and second-class offices must retain, in orderly files, all orders concerning the makeup and dispatch of mail until they have been superseded.

(b) In offices where scheme distribution is required, the dispatching clerks must be familiar with current schemes and distribute and dispatch mail accordingly. Supervisors in immediate charge of distribution clerks must be familiar with the various distribution schemes of the office and at least twice monthly shall make verifications of the distribution performed by each clerk. Where conditions warrant, more frequent verifications shall be made. Where performance is unsatisfactory, appropriate corrective measures shall be taken. This duty should be divided among these supervisors so that it will not be necessary for all supervisors to be familiar with all schemes. A clerk found to be habitually making an unusually large number of errors should be required to take a scheme examination. In offices not required to distribute by scheme, the dispatching clerks must make such separations as will advance the mail. [Postal Procedures Transmittal Letter 17, 5-17-56.]

STATEMENT

Petitioners, all of whom are Postal Clerks, brought suit in the Court of Claims to recover compensation under the Act of July 6, 1945, *supra*, pp. 2-5, for work after hours which they were required to perform by the Post Office Department. The Department has not paid any compensation whatever for these hours, although the statutes applicable to Postal Clerks specifically provide for payment for all hours of work. The facts are not in dispute and are substantially as follows:[1]

[1] Each of the petitioners and J. W. Bowen, Secretary-Treasurer of the National Federation of Post Office Clerks, have set out the full details of scheme study activities in affidavits appearing in the Record, P. 81 to 125.

The Post Office Department, in order to carry out its function of handling mail from the time of mailing to the delivery to the addressee, has worked out elaborate "schemes." These "schemes" cover all steps in the movement of the mail to its destination. *Supra*, p. 16. The prime objective is speedy and accurate handling to insure the delivery of the mail in the shortest possible period of time (R. 83, 84).

A scheme is a printed or mimeographed book listing names of towns or city streets (R. p. 86, 87). It contains directions as to the means and routes by which the mail will move, e.g., towns might be supplied by one or more railroads, air carriers, Highway Post Office, star routes, or other means (R. 82).

The postal clerk is required to commit the scheme to memory. Furthermore, he is required to know the physical means by which the mail is moved forward from his section. This is done by placing it in a case divided into appropriate separations. Finally, he is required to practice, using cards and cases which simulate actual distribution of mail. The Post Office Department is continuously changing its schemes and these changes must be written into the scheme books and committed to memory by the clerks (R. 82, 83, 90, 91).

To insure that the clerks carry out their duty and function of learning the schemes and becoming adept at rapidly and accurately throwing the mail in accordance with schemes, the Post Office Department gives frequent examinations. New employees take examinations every 90 days for first 12 to 18 months; thereafter examinations are given annually. *Supra*, pp. 5, 6. To pass an examination, it is required that the clerk make no more than five (5) errors out of 100 during a fixed period of time. Failure leads to dismissal. *Supra*, pp. 8, 9.

At some post offices, equipment and space is provided and clerks are paid for learning and practicing schemes (R. 92, 93, 95, 96). At others, including Cincinnati, Ohio, Indianapolis, Indiana, Lincoln, Nebraska, and St. Paul, Minnesota, where the petitioners are employed, scheme study and practice is performed by the clerks in their homes. When it is performed at home, it is not paid for. The homework is usually performed after eight or more hours of work at the post office, or on Saturday, Sunday, or holidays. Scheme study is a continuous obligation demanding a substantial number of hours of work each year for all clerks, including petitioners. Wherever performed it is difficult, time consuming and is very demanding in terms of mental and physical exertion (R. 82, 97-126).

Congress in 1945 enacted a comprehensive postal employees pay act. *Supra*, pp. 2-5. Among other provisions, it provided that when regular clerks were required to work in excess of eight (8) hours a ~~day, they~~ were to be paid on the basis of 150 per centum of their annual salary. *Supra*, p. 4. The Act also provided straight time pay for all hours worked by substitute clerks. *Supra*, p. 5. It also provided compensatory time off for work on Saturdays, Sundays and holidays. *Supra*, p. 3.

Under these provisions of the statute, petitioners brought suit in the Court below to obtain payment for uncompensated work hours during which they were engaged in scheme study activities. Both parties moved for summary judgment on the pleadings, affidavits and exhibits attached to their motions. The Court dismissed petitioner's motion, granted defendant's motion and dismissed the petition. The Court of Claims denied petitioner's claims on the ground that Congress had not made specific reference to payment for scheme study.

REASONS FOR GRANTING THE WRIT

The Court below ignored the straightforward, unambiguous terms of the postal workers pay Act of July 6, 1945. *Supra*, pp. 2-5. In doing so, the Court of Claims refused to apply this Court's interpretation of the term "work" particularly as to what type of activity is to be deemed included therein in making payment under the federal statutes relating to pay for overtime work. The Court of Claims also departed from the specific provisions of the statute in ruling that the Post Office Department could arbitrarily classify certain types of work performed at certain times and places as non-compensable.

The decision of the Court of Claims, in effect, holds that an employee is not working even though he is engaged in activities carried on by him as a necessary part of the business of the Post Office, controlled and required by the Department for its benefit, and necessitating mental and physical activity. This is directly contrary to several decisions of this Court defining the term "work" and determining the nature of the activities embraced thereunder. *Tennessee Coal, Iron and R.R. Co.* v. *Muscoda*, 321 US 590; *Jewell Ridge Coal Corp.* v. *United Mine Workers*, 325 US 161; 89, Led, 1534, 65 S.Ct. 1063; and *Anderson* v. *Mt. Clemens Pottery Company*, 328 US 680.

The wording of the postal workers pay Act is very precise. It provides for compensation for all hours worked and also provides that if regular clerks are required to work beyond eight hours per day they shall be paid time and one-half for such overtime service. *Supra*, pp. 2, 4, 5. The Act contains no exemptions for special kinds of work nor is there any provision prohibiting payment to employees who work at any particular time or place.

Thus, the decision below is clearly at odds with the explicit language of the statute, the purpose and policy of Congress in enacting it, and the applicable decisions of this Court as to what constitutes compensable work. It is discriminatory in that it gives judicial sanction to the practice of a government agency compensating employees for work done at a certain time and place, while denying compensation for the same work if done elsewhere at a different time. As such, the decision is an important one not only because of its adverse effect on petitioners but because the principle established constitutes a threat to all federal employees. The question involved is one basic in the administration of the federal pay statutes, and constitutes an important question of federal law which has not but should be settled by this Court. For these reasons and because, as will be demonstrated below, there is substantial doubt of the correctness of the decision of the Court of Claims, we respectfully submit that decision should be reviewed.

1. *The statutory language is clear and unambiguous; it requires compensation for scheme study work.*—(a) *The provisions of the statute.* Section 2 of the Act of July 6, 1945 (39 USC 852) provides that "Employees shall be required to work not more than eight hours a day except as provided in Section 4 of this title" (39 USC 854). Section 4 governs pay for overtime hours and the language is simple and direct: "In emergencies or if the needs of the service require, employees may be employed in excess of eight hours per day and for such overtime service they shall be paid on the basis of 150 per centum of the annual rate of pay received by such employees." Section 3 establishes a formula for compensation on weekends and holidays using this language: "When the needs of the service require employees to perform service on Saturday, Sunday or

holidays such employees shall be allowed compensatory time for such service. . . ."

Each of these sections is concerned with pay for extra hours of work for regular clerks. Substitutes are not covered by these sections but must be paid straight time for all hours worked. *Supra*, p. 5.

Scheme study activities meet all of the criteria for "work." *Infra*, p. 19. Accordingly, against the statutory background the Department is obligated to pay for time spent learning and practicing schemes for there are no exceptions provided in the Act nor is any distinction made as to the kind of work or the place it is to be performed.

The words of limitation which the defendant and the Court of Claims read into the Act, i.e. "off-the-job" and "off-the-clock" do not appear therein. They would read the Act as excluding work done away from the Post Office and outside of ordinary working hours. There is no justification for such an interpretation. The statute is clear, precise and without ambiguity. It contains no exceptions or exemptions. There is no room here for treating scheme study and practice differently than any other work.

There being no ambiguity in the statute, it was incumbent on the Court to apply the statute as it was written once it was determined that the services in question constituted "work." The Act requires compensation for all hours worked without exception and the Court in ruling otherwise indulged in judicial legislating. This Court has held many times that Courts may not so legislate. *U. S.* v. *First National Bank*, 234 US 245, 58 L.ed. 1298, 34 S.Ct. 846. Furthermore, it is the well recognized position of this Court that when Congress uses familiar words conveying a clear and definite meaning, they are to be used in their ordinary

sense. *Addison* v. *Holly Hills*, 322 US 607, 88 L.ed. 1488, 64 S.Ct. 1215, *Osaka Shosen Kaisha Line* v. *United States*, 300 US 98, 81 L.ed. 532, 57 S.Ct. 356, *United States* v. *Shreveport Grain and Elevator*, 287 US 77, 77 L.ed. 175, 53 S.Ct. 42, and *Dameron* v. *Brodhead*, 345, US 322, 97 L.ed. 1041, 73 S.Ct. 721.

(b) *The legislative history of the Act supports the claim of the petitioners.*—The legislative history of the Act of July 6, 1945, clearly indicates that the language of the statute must be interpreted literally if the purpose of the legislation is to be achieved.

Arthur S. Flemming, United States Civil Service Commissioner, testified in favor of the overtime provision which became law. He favored "genuine overtime pay" whereby the employee "should receive extra pay for work beyond his normal working hours" and receive a higher rate for such hours "to compensate for increase in fatigue, decrease in normal leisure time, and in many instances, additional expense." The extra cost to the government would, he believed, discourage management from working employees overtime and would serve to spread employment.[1] The Post Office

[1] In connection with hearings before the committee on Civil Service, U. S. Senate, 79th Congress, first session on S. 807, page 15, Mr. Flemming testified as follows: "Passing from section 306, dealing with the increase in basic rates of pay, we believe that the provision for genuine overtime pay for the 1,525,000 employees covered by this bill as set forth in section 102, should be enacted into law.

"From the employee's standpoint, he should receive extra pay for work beyond his normal working hours, and the rate of overtime pay should be higher than the regular rate *to compensate for increase in fatigue, decrease in normal leisure time, and, in many instances, additional expense.*

"It is generally recognized that overtime work is not as effective as work during regular hours of duty, and that in normal times overtime is often the result of bad management practices. If adequate controls are maintained over appropriations, the extra expense involved in overtime will discourage its use, and, in the long run, encourage better management.

Department officials supported this point of view.[2] The report of Congress, accompanying legislation leading to the Federal Employees Pay Act of 1945, reflected the purpose of Congress to provide overtime for Federal employees as a reward for the added burden of overtime and to discourage the government from working employees overtime.[3]

The principle of extra pay for overtime hours estab-

"Furthermore, in the post-war period, overtime work schedules should be done away with, in both industry and Government in favor of affording more widespread opportunity for employment.

"It is difficult to see how any goal touching 60,000,000 persons employed can be achieved under any other policy.

"*The Federal Government, as an employer, has already recognized the soundness of this policy as a permanent proposition, except for those employees covered by the provision of this bill.*" (Emphasis supplied.)

[2] The following is an excerpt of the testimony of Mr. Joseph F. Gartland, Director of Budget and Administrative Planning, Post Office Department, before the committee on post office and post roads, U. S. Senate, 79th Congress, 1st Session on S. 908 and H. R. 3035:

"Our particular belief is, or I may say that it is the attitude of the Post Office Department, that we do not believe in overtime. We do not believe it is productive. We believe that after a man has worked his 8 hours a day that any money you pay him for overtime is too excessive for what you get out of it. Anything that makes overtime expensive costs the Post Office Department, and we are doing our utmost to cut down to a minimum, and time and one-half or double time, if it is considered as punitive is something that must be watched, something to do away with."

[3] The following statement was made on page 2 of House Report No. 726, 79th Congress, 1st Session, accompanying H. R. 3593, companion bill to S. 807 which was subsequently enacted as the Federal Employees Pay Act of 1945.

"From the employee's standpoint, he should receive extra pay for work beyond his normal working hours, and the rate of overtime pay in principle should be higher than the regular rate to compensate for increase in fatigue, decrease in normal leisure time, and often additional expense. From the government's standpoint also, overtime should call for extra payment at a premium rate because overtime work under usual conditions is to be discouraged. Further, the necessity of securing additional funds to meet the extra expense for overtime should be an occasion for the encouragement of better management to avoid overtime schedules. . . ."

lished for postal workers in the Act of July 6, 1945, gave them the same type of benefits generally as was provided for other Federal employees in the Federal Employees Pay Act of 1945. This was in line with the policy of the Federal government reflected in other legislation enacted for the benefit of various groups of Federal employees in 1940 to 1945.[1] It was also in line with the policy of the government to discourage long hours of work for employees working on government supply contracts[2] and employees of private employers whose work is related to interstate commerce.[3] The language of the statute and the purpose and policy of Congress revealed by the legislative history of the Act make compensation for work performed after eight hours mandatory. The scheme study work of petitioners was performed beyond their normal working hours, interfered with their normal leisure time and caused them additional expense. Hence hours spent in scheme study come squarely within both the letter and spirit of the Act. The only question then is whether scheme study and practice constitute "work" required by the "needs of the service."

2. *Scheme study activities meet all of the criteria of "work."*—The use of such term as "work," "employed" and "overtime service" in the Act of July 6, 1945, must be assumed to have been used by Congress in the same sense as those words were construed by this Court in several cases in the years immediately

---

[1] e.g. Act of June 28, 1940, ch. 440, 54 Stat. 676, Title I, Sec. 5 (a); War Overtime Pay Act of 1943; which culminated in the Employees' Pay Act of 1945, June 30, 1945, ch. 212, Title II, Sec. 201, 59 Stat. 296 (5 USC 911).

[2] Walsh-Healy Public Contracts Act, June 30, 1936, ch. 881, 49 Stat. 2036 (41 USC 35, et seq).

[3] Fair Labor Standards Act of 1938, ch. 676, 3rd Session, 75th Congress (29 USC 201, et seq).

preceding enactment of the legislation.[1] Although the decisions of the Court construed these terms in connection with the application of the Fair Labor Standards Act of 1938, the purpose and policy of both Acts were the same.[2] This was recognized by the Court of Claims in *Winsberg* v. *United States*, 120 C. Cls. 511 and *Farley* v. *United States*, 131 C. Cls. 776.[3] The facts in those cases were not unlike the facts presented here. In those cases the Court of Claims reached the conclusions that employes under Federal overtime statutes were engaged in compensable activities although they were working outside of their ordinary shift and although it had not been the practice of the agency to provide any compensation for such hours. It seems wholly inconsistent and without statutory authority, therefore, for the Court below to have arbitrarily read into the Act of July 6, 1945, the limitation that the Department need not recognize, as work, activities performed "off the job" and "off the clock."

This Court in *Tennessee Coal, Iron and R.R. Co.* v. *Muscoda, supra*, in defining the term "work" for the purpose of applying the overtime provisions of the Fair Labor Standards Act held in 1944: *"And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or*

---

[1] Tennessee Coal, Iron and R.R. Co. v. Muscoda, 1944, 321 US 590, 88 L.ed. 949, 64 S.Ct. 698. Jewell Ridge Coal Corp v. Local No. 6167, United Mine Workers of America, May 7, 1945, 325 US 161, 89 L.ed. 1534, 65 S.Ct. 1063.

[2] This Court has on several occasions reviewed and restated the legislative purposes of the Fair Labor Standards Act of 1938. Rutherford Food Corp. v. McComb, 331 US 722, 91 L.ed. 1772, 67 S.Ct. 1473. U.S. v. Darby Lumber Co., 312 US 100, 85 L.ed. 395, and Overnight Motor Transp. v. Missel, 316 US 572, 86 L.ed. 1682, 62 S.Ct. 1216.

[3] In deciding what activities must be included for the purpose of determining compensable overtime hours, the Court of Claims in these cases applied the interpretations of this Court in Wantock v. Armour & Co., 323 US 126, and Skidmore v. Swift, 323 US 134, both of which arose under the Fair Labor Standards Act of 1938.

employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.". (Emphasis supplied.)

There is no disagreement as to the facts. The petitioners' task was a busy one involving both mental and physical exertion. Substantial numbers of hours were required to learn the scheme initially and to prepare for annual examinations. Petitioners prepared thousands of cards, memorized them and practiced throwing the cards into practice cases. This was difficult and time consuming, requiring the highest degree of concentration and persistence, (R. 120, 121, 125).

The scheme study was required and controlled by the defendant. *After* petitioners had passed Civil Service Examinations qualifying them as postal clerks and *after* they were employed as clerks, they were called to the examiner's office and handed scheme books (R. 99, 102, 105, 109). They were told to prepare cards reflecting each item of information (i.e. name of town or section of a city street on one side with the method by which mail was to reach that destination on the other) (R. 88, 89, 112). And they were instructed to commit all of this information to memory. They were told to obtain practice cases and practice throwing the cards into appropriate sections of the practice case as designated by the Post Office Department (R. 112, 113,). This practice simulated actual handling of the mail (R. 85). Time limits were set by the Department and petitioners were required to submit to examinations at fixed intervals. Examinations were graded as to speed and accuracy—a high degree of both being required. Failure to pass the examination on the scheme and failure to do the day-to-day job of distributing the mail

in accordance with the scheme could lead to dismissal (*Supra*, pp. 8, 9, R. pp. 83, 84.) Hence in the strictest sense the Department required and controlled the scheme study work of petitioners.

Scheme study work is engaged in necessarily and primarily for the benefit of the Post Office Department and is required by the needs of the service. The activity of petitioners in learning and practicing the schemes meets not only this Court's definition of "work" but also the precise language of the Act of July 6, 1945. Section 4, *supra*, p. 4, which provides for overtime at time and one-half for hours in excess of eight "if the needs of the service require . . . such overtime service."

The purpose of scheme study is to fully equip the clerk so that he can distribute mail quickly and accurately in accordance with a plan conceived by the Post Office Department and so that he may be aware of all of the frequent changes made in the plan by the Department to meet changing conditions, *supra* pp. 10, 11. The regulations require that outgoing mail be distributed within one hour of the time shown in the postmark, and incoming mail must be distributed immediately. *Supra*, p. 10. To accomplish the objective of speedy and accurate handling of mail under the constantly changing schemes, the clerk must be so familiar with the scheme that he can automatically react to the name of the town or the section of a city as shown on a piece of mail and immediately place it in the designated section of the distribution case in order that the mail will move forward to its destination without delay. (R. 85.) Scheme study and scheme study alone makes it possible for the clerk to perform in a highly efficient manner and the scheme examination is simply the means designed to accomplish this end.[1] Neither the

[1] Significantly, examination time is counted and paid for as hours

information nor the skill acquired can be put to any use other than in the istribution of mail for the United States Post Office Department. (R. 85.) The schemes for distribution are merely blueprints designed by the Department to accomplish its particular purposes in a manner prescribed by it alone. Consequently, this type of activity cannot be compared to the study and preparation needed to acquire independent skills such as stenography or telegraphy. Scheme study, however, is comparable to the vast variety of paid training and retraining programs continuously carried on throughout the government.

It is obvious, and not disputed, that the functions of the Post Office Department in distributing mail is dependent upon the scheme study activities of its clerks. In fact, such activities constitute an essential and integral part of the distribution of mail. In the words of the Postmaster General—"scheme examinations and a working knowledge of schemes are integral parts of the postal clerk's job." (R. 32.) This court has held employees of a battery plant engaged in changing clothes and the employees of a packing plant engaged in sharpening knives to be engaged in work because, although performed outside of regular working hours, such activities constitute an essential and integral part of the activities for which they are employed. *Steiner* v. *Mitchell*, Jan. 30, 1956, 350 U. S. 247. *Mitchell* v. *King Packing Co.*, Jan. 30, 1956, 350 U. S. 260. Hence, in the fullest sense scheme study activities constitute "work," "employment," or "services" within the meaning of this Court's definition of these terms and most certainly come within the category of overtime services required by the "needs of the service" made compensable under the statute.

3. *Inaction on the part of Congress does not con-*

stitute a basis for interpreting a statute contrary to the plain implication of its language.—The Court below did not dispute that scheme study constitutes "work" or that the "needs of the service require" it to be performed. It simply upheld its decision of 24 years ago in *Deland* v. *United States* (Appendix "B") that the statute did not provide pay for scheme study work. The rationale of the Court in the *Deland* case was applied to the Petitioners' claims. It is the position of the Court of Claims that because the Department had never paid for scheme study work, Congress was obligated in the Act of July 6, 1945, to specifically name scheme study work before it could be decreed a statutory obligation. To support that position, reference is made by that Court to the fact that legislation had been introduced to pay for scheme study at certain periods of the day but that Congress had never acted on such legislation.

Petitioners are aware of no judicial authority that supports the position that the failure of an agency to comply with a statute over a period of years constitutes nullification. Nor is petitioner aware of any rule of statutory construction that holds that purely negative action on the part of Congress constitutes a basis for interpreting a statute contrary to the plain implication of its language.

The petitioners concede that bills were introduced in Congress from time to time both before and after the act of July 6, 1945. The nature of these bills is indicated by the correspondence between the Postmaster General and the House Committee (e.g., R. p. 36). These bills would require that the Postmaster General set aside a portion of each eight-hour day, usually 30 minutes, for scheme study. None of the bills referred to scheme study work performed at home. Petitioners can find no record of any action being taken by Con-

gress or by Congressional committees as a result of introduction of this legislation. Certainly it cannot have the effect of controlling the clear, precise language of the statute, particularly in light of the legislative history of the Act. Inaction by the legislature was held by this Court to be without meaning in *Gemsco* v. *Walling*, 324 US 244, 89 L.ed. 921, 65 S. Ct. 605, and in *Order of Railway Conductors of America et al* v. *Swan et al*, 329 US 520, 529, 67 S. Ct. 405, 410, stated:

> "Finally petitioners point out that Congress has failed to amend Sect. 3 First (h) so as specifically to exclude 'yardmasters and other subordinate officers' from the jurisdiction of the First Division, despite the introduction of two bills to that effect in the Senate in 1940 and 1941. These bills were sent to an appropriate committee, but were never reported out. It does not appear whether the bills died because they were thought to be unnecessary or undesirable. No hearings were held; no committee reports were made. Under such circumstances, the failure of Congress to amend the Statute is without meaning for purposes of Statutory interpretation."

There may have been a thousand reasons why such bills were not acted upon by the committee. For instance, the committee may have thought that 30 minutes was too long or too short a period or that the legislation was not needed.

Many Post Offices now follow a practice of having employees engage in scheme study activities at the Post Office and pay them for all or a part of their time. This is true in Philadelphia, Minneapolis, and other places (R. p. 92, 96). Congress, knowing that the Department is currently paying for scheme study work, may have believed new legislation was unnecessary. In

any event a mere record of inaction on the part of Congress or the failure of an agency to comply with the law cannot be construed as nullifying the precise unambiguous provisions of the Act of July 6, 1945.

4. *The difficulties of administration do not serve as a sound basis for disregarding statutory requirements.* —The Court below, although its decision was based on other grounds, makes reference to and appears to have been influenced by the difficulties of checking the number of hours worked when work is performed at home. In doing so, they appear to have completely ignored the uniform decisions of the Courts under the Fair Labor Standards Act which hold that employers are responsible for compliance with wage and hour standards for work performed by employees at home or elsewhere away from the employer's premises. *Wagner* v *Mitchell* (CCA 2), 217 F. 2d, 303, cert. den. 348 U. S. 964; *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60; *Walling* v. *Twyeffort, Inc.* (CCA 2), 158 F. 2d 944, cert. den. 331 U. S. 851, cited with approval in *Rutherford* v. *McComb*, 331 U. S. 722, 729; *Gemsco* v. *Walling*, 324, U. S. 244; *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633; *American Newspaper Guild* v. *Republican Publishing Co.*, 172 F. 2d 943; *Barker* v. *Georgia Power & Light Co.*, 2 W. H. Cases 486; *Gorchakoff* v. *California Shipbuilding Corp.*, 63 F. Supp, 309; *Chepard* v. *May*, 71 F. Supp. 389[1]. If the problem of checking the number of hours worked at home is a problem to the Post Office Department, they can solve it very simply by having the work done at the Post Office, a practice which, as petitioners point out above, is followed in many post offices.

---

[1] See also Interpretative Bulletin Part 785 (a) of Secretary of Labor respecting homework under the Fair Labor Standards Act: "The rule is also applicable to work performed away from the premises or the job site, or even at home."

The Court below seemed also to be influenced by the fact that paying for home work places a "premium on stupidity." It is obvious, of course, that there are always variations in the productivity of workers, but assuming that the Civil Service examinations provided a reasonable means for the selection of employees with a reasonable aptitude for the work, it would not seem that post office clerks are more or less stupid than other people or that the problem of the Department in this regard is any different than that which affects employers generally.

Finally, if problems do exist, it is up to the Post Office Department to do something about them, for it is that Department and not the petitioners who have insisted on unsupervised homework. In any event, the existence of these problems does not justify setting aside the statute for as this court said in *Addison* v. *Holly Hills*, *supra*, p. 16, "the natural meaning of words cannot be displaced by reference to difficulties in administration."

CONCLUSION

For the reasons indicated herein, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HERBERT S. THATCHER,
1009 Tower Building,
DONALD M. MURTHA,
Washington 5, D. C.,
Attorneys for Petitioners.

APPENDIX A

IN THE

United States Court of Claims

No. 370-56

(Decided May 8, 1957)

THOMAS E. ANDERSON, ET AL. v. THE UNITED STATES

Mr. Donald M. Murtha, for the plaintiffs. *Mr. Herbert S. Thatcher* was on the brief.

Mrs. Sondra K. Slade, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiffs, employees of the Post Office Department, seek time and one-half overtime pay for time spent by them, *off the job*, studying for Post Office scheme examinations. In addition, they seek certain sums as reimbursement for amounts paid by them for practice cases and cards designed to assist them in learning the schemes.

Defendant has moved to dismiss the petition for the reason it fails to state a claim upon which relief can be granted.

The questions presented are: (1) whether payment is authorized by law for time spent by Post Office clerks

outside their regular hours of duty in preparing for scheme examinations required by Post Office regulations, and (2) whether plaintiffs can be reimbursed for sums paid out for practice cases and cards.

The facts as alleged in the petition are these: Each plaintiff is, and has been at all material times, an employee of the Post Office Department assigned to the distribution of mail, in which either a general or a city scheme distribution is required by the defendant.[1] A general scheme is a printed list of all post offices in a state and shows how each office is supplied by mail. A city scheme is a list showing routing of city mail to carriers, box sections, stations and branches. Each distributing clerk was required to memorize the items of information contained in said lists and to *keep them currently corrected* when changes were made by the Department. Each clerk *when employed* was informed that he would be required to maintain a certain degree of proficiency as to accuracy and speed with respect to the schemes that related to his assignment, and that, as to his original assignment, examinations would be given every few months until his ability to perform in accordance with fixed standards was demonstrated. In addition, each plaintiff was informed that after completion of examinations on his initial assignment, he would have to take and pass periodic examinations (usually annual) on sections of the scheme assignment, this examination taken to be repeated continuously.[1]

---

[1] Although proficient distributing clerks are absolutely essential to the establishment and maintenance of an efficient postal service and although periodic examinations appear to be, after long years of trial and experience, the only way to insure proficiency, nevertheless the Post Office Department has narrowed the otherwise mandatory requirement of examination passing so that:

> (1) Clerks not called upon to perform any distribution except during the Christmas period should be given a simple primary scheme of distribution, such as is furnished temporary employees for study incident to handling Christmas mails. * * * These employees should

Passing of the examinations was necessary for the retention of the employee in his distributing clerk's job. Each employee was required to study in order to pass said examinations and the method used was for each clerk to purchase or prepare cards which he threw into appropriate compartments in a practice case which he also purchased. The study is not and cannot be performed during the employee's 8-hour tour of duty at his job. It is for this "off-the-job" practice and study that plaintiffs seek overtime compensation in this suit. The cost of the necessary cards and practice cases is also asked for in the petition.

It is plaintiff's contention that the time they spent studying for their case examinations, the taking of which is required by the Manual of Instructions for Postal Personnel (1948), chapter III, article 55, *is overtime work* for which they should be paid *time and one-half* because it is in excess of the eight hours of work required by section 2 of the Act of July 6, 1945, 59 Stat. 435.

Defendant contends that plaintiff's claim rests entirely on the 1945 act, *supra*, and that since neither the statute relied on nor any other statute provides overtime compensation *for case examination* preparation, plaintiffs are not entitled to recover. Defendant

---

be relieved of any other scheme requirements during the remainder of the year. Manual of Instructions for Postal Personnel (1948) Chapt. III, Art. 55 (d).

(2) No clerk shall be examined on any scheme that he is not required to use regularly, either daily, monthly, or at seasonal or peak periods, except that this shall not apply to clerks or substitutes who may be preparing for an assignment. No clerks shall be examined more than once each year on a scheme on which he has qualified. Manual *Op. cit., supra* (e).

(3) Clerks past 55 years of age, or who have been in the service for 25 years, are exempt from examinations, but any distributor who permits himself to become inefficient in the performance of his duties shall be required to qualify again by passing a satisfactory scheme examination. Manual *Op. cit., supra* (j).

further contends that "off-the-clock" time spent in preparing for case examinations is not overtime, and that Congress, aware of the situation for at least 30 years, consistently refused to provide overtime pay, straight pay, time and one-half, or "on-the-clock" study periods for distributing clerks.

This exact situation was before the court in 1933 in the case of *Deland* v. *United States*, 77 C. Cls. 55, wherein this court *held that distributing clerks were not entitled to compensation for study "off-the-clock" for case examinations, for the reason that Congress had consistently refused to provide such pay and the act involved did not so provide.*

Plaintiffs argue that times have changed and the principles of the Fair Labor Standards Act of 1938, 52 Stat. 1060, are equally applicable to the postal pay act of July 6, 1945, *supra*, and as a result the decision in the *Deland* case, *supra*, should be reconsidered and abandoned.

We are unable to agree with plaintiff's contention. The Act of February 28, 1925, 43 Stat. 1053, 1059, under which plaintiff sued in the *Deland* case was the predecessor of the Act of July 6, 1945, *supra*, and Congress intended no change other than providing 150 per centum rather than straight overtime. Since this court found that Congress under the 1925 act, *supra*, did not intend to provide for "overtime" pay under a situation exactly like this, and since Congress intended no change in the 1945 act other than as outlined above, we adhere to our former decision in the *Deland* case. *The 1945 act does not authorize or provide for payment of compensation for time spent by plaintiffs in their own homes studying for case examinations.*

This is purely a matter for Congress. Congress being aware of the decision in the *Deland* case, had it

wanted distributing clerks to receive overtime pay, such as sued for here, could have very simply so provided. Inasmuch as no provision was made by Congress, we can reasonably assume it did not so intend.

The reason for the failure of Congress to so provide seems obvious to us. There would be absolutely no way for the Post Office Department to check on any overtime, leaving the way open to fraud. Furthermore, such a system would put a premium on stupidity; *i.e.*, a person possessing a greater degree of intelligence would master the system more quickly and thus earn less overtime pay.

As to plaintiff's second claim for reimbursement for sums paid out for cards and practice cases, we can find no statute, nor is a statute pointed out, authorizing such expenditures. The expenditure not being authorized by law, plaintiffs must also fail on this claim.

Accordingly, defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied, and the petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

APPENDIX B

IN THE

United States Court of Claims

No. M-402

(Dated February 6, 1933)

EDWARD L. DELAND v. THE UNITED STATES

Mr. Maurice Rabinovitz for plaintiff. Mr. Thomas F. Flaherty was on the brief.

Mr. Louis R. Mehlinger, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following:

SPECIAL FINDINGS OF FACT

The plaintiff, Edward L. Deland, is and has been employed by the United States Government as a post office clerk in the Cleveland, Ohio, post office since on or about October 1, 1922, being assigned thereat to the distribution of mail.

All clerks assigned to the distribution of mail in the first- or second-class post offices are required to take what is called scheme examinations, which are required for the purpose of determining the capacity of such clerks to properly distribute the mail for delivery. For the purpose of determining the qualifications of such clerks to make a proper distribution, examinations are held. When plaintiff was appointed the superintendent

of mails sent him to an official who had charge of the examinations, and who gave him a copy of what was called the city "primary scheme" which appears to have been the basis of the examination. The examiner advised him that he would be required to take an examination on one-half of the scheme once a year.

During the period from September 15, 1930, plaintiff devoted a total of 22 hours to preparing for the examination ordered and required by the regulations. During this period the plaintiff worked his regular eight-hour tour of duty at the post office, and the time used by him in preparing for the examination was outside and beyond his work at the post office, for which there was no time available during his regular hours.

About April 2, 1931, the plaintiff filed a claim for compensation in the General Accounting Office at Washington in which the payment of $18.92 was requested for the performance of 22 hours' work in preparing for the examination as aforesaid upon the ground that the work so performed was "overtime work" within the meaning of the law. This claim was rejected by the Comptroller General of the United States on July 13, 1931.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

Green, Judge, delivered the opinion of the court:

Plaintiff was and is a post office clerk at Cleveland, Ohio, assigned to the distributtion of mail, and was required by the postal laws and regulations to take "case examinations" for the purpose of determining his qualifications to serve as such clerk. Of this requirement he was duly notified by the proper officials and in order to prepare himself for such examination the plaintiff, during the period involved, devoted 22 hours to the work involved. This time was outside and beyond his regular hours of work at the post office during which no time was available for the purpose of preparing for the examination. Plaintiff now seeks to recover payment for such work on the ground that it was overtime within the meaning of the law.

We are unable to agree with the plaintiff's contention. The post office had authority to require him to pass examinations for the purpose of determining whether he was qualified to fill the position. The law applicable to the case has been in force many years and under it compensation has always been denied for such work as that for which plaintiff now demands pay. Proposals have been made to modify the law and the attention of Congress has been called to the practice of the Post Office Department, but Congress has refused to take any action. We think the action of the Department and the ruling of the Comptroller General are in accordance with the proper construction of the statutes applicable to the question involved, and if there were any doubt about the matter it has been removed by long continued practice during which period Congress has refused to modify the law.

We are not concerned with the rulings of the Post Office Department with reference to a somewhat similar

question arising in connection with the services of railway mail clerks and are not called upon to determine whether such rulings are right or wrong.

The plaintiff's petition must be dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* and LITTLETON, *Judge*, concur.

BOOTH, *Chief Justice*, took no part in the decision of this case on account of illness.

Office - Supreme Court, U.S.
FILED
JUL 23 1957
JOHN T. FEY, Clerk

No. 212

In the Supreme Court of the United States

OCTOBER TERM, 1957

THOMAS E. ANDERSON, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
SEYMOUR FARBER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:

Barker v. *Georgia Power & Light Co.*, 1942, 2 W. H. Cases 486 — 10

Chepard v. *May*, 71 F. Supp. 389 — 10

Deland v. *United States*, 77 C. Cls. 55 — 6, 7, 8

Jewell Ridge Coal Corp. v. *Local No. 6167, United Mine Workers*, 325 U. S. 161 — 9

Mitchell v. *King Packing Co.*, 350 U. S. 260 — 9

Old Colony R. Co. v. *Commissioner*, 284 U. S. 552 — 9

Pine Hill Co. v. *United States*, 259 U. S. 191 — 8

Republican Publishing Co. v. *American Newspaper Guild*, 172 F. 2d 943 — 10

Steiner v. *Mitchell*, 350 U. S. 247 — 9

Tennessee Coal, Iron and R. R. Co. v. *Muscoda Local*, 321 U. S. 590 — 9

United States v. *Dakota-Montana Oil Co.*, 288 U. S. 459 — 9

Statutes:

Act of February 28, 1925, 43 Stat. 1053 — 6

Act of July 6, 1945, 59 Stat. 435 — 5

Section 1 (39 U. S. C. 351) — 11

Section 2 (39 U. S. C. 852) — 11

Section 3 (39 U. S. C. 853) — 12

Section 4 (39 U. S. C. 854) — 6, 13

Fair Labor Standards Act of 1938, 52 Stat. 1060 — 9

R. S. 396, 42 Stat. 25 — 5

Miscellaneous:
H. R. 4846, 68th Cong., 1st Sess.
H. R. 5018, 69th Cong., 1st Sess.
H. R. 7457, 70th Cong., 1st Sess.
H. R. 6796, 71st Cong., 2d Sess.
H. R. 444, 72d Cong., 1st Sess.
H. R. 1707, 73rd Cong., 1st Sess.
H. R. 45, 74th Cong., 1st Sess.
H. R. 4647, 75th Cong., 1st Sess.
H. R. 995, 76th Cong., 1st Sess.
H. R. 2760, 77th Cong., 1st Sess.
H. R. 68, 78th Cong., 1st Sess.
H. R. 465, 79th Cong., 1st Sess.
H. R. 98, 80th Cong., 1st Sess.
H. R. 246, 81st Cong., 1st Sess.
H. R. 127, 82d Cong., 1st Sess.
H. R. 84, 83d Cong., 1st Sess.
H. R. 1416, 83d Cong., 1st Sess.
H. R. 1425, 83d Cong., 1st Sess.
H. R. 183, 84th Cong., 1st Sess.
H. R. 543, 84th Cong., 1st Sess.
Manual of Instructions for Postal Personnel (1948):
Ch. III, Art. 55:
Section (a)
Section (b)
Section (c)
Section (d)
Section (e)
Section (f)
Section (g)
Section (h)
Section (i)
Section (j)
Section (k)
Section (l)
Appendix A; Art. 59 4,

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 212

THOMAS E. ANDERSON, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. A, pp. 28–32) is reported at 150 F. Supp. 881.[1]

JURISDICTION

The decision of the Court of Claims was entered on May 8, 1957. (Pet. App. A, p. 28). The petition for a writ of certiorari was filed on June 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

[1] It should be noted that the opinion as reproduced in petitioners' appendix contains numerous phrases and sentences which are italicized. Those italics do not actually appear in the court's opinion (R. 147–150).

QUESTION PRESENTED

Whether Congress has authorized payment for time spent by post office clerks, at home and outside their regular hours of duty, in studying for certain examinations required by postal regulations.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 11–17.

STATEMENT

By suit filed in the Court of Claims, petitioners, fifteen mail distribution clerks in the employ of the Post Office Department, sought to recover overtime pay for time spent by them, at home and outside their regular hours of duty, studying for Post Office scheme examinations (R. 1–7). The Court of Claims dismissed the complaint, holding unanimously that the overtime compensation provisions of the Act of July 6, 1945, *infra*, p. 13, upon which petitioners attempted to ground their claims, were plainly not intended to provide compensation for the at-home study engaged in by the petitioners (Pet. App. A, pp. 28–32).[2]

The relevant facts are as follows:

Each of the petitioners is, and has been at all material times, an employee of the Post Office Department assigned to the distribution of mail (R. 3). The distribution function entails knowledge and memori-

[2] Petitioners also sought to be reimbursed for certain materials that they had purchased to assist them in their home study of the Post Office schemes (R. 6). The lower court also denied this claim (Pet. App. A., p. 32). Petitioners do not urge as error the court's ruling in this regard.

zation of "schemes" or patterns of distribution, set up and issued by the Post Office Department, showing how each post office is supplied by mail.[3] Since knowledge of a scheme or set of schemes is required for performance of the distributing clerk's job, each of the petitioners was informed, upon his becoming a distributing clerk, that he would have to attain and maintain a certain degree of accuracy and speed with respect to the schemes that related to his assignment and that, as to his original assignment, examinations would be given every few months until he could demonstrate his ability to perform (*i. e.*, distribute) in accordance with fixed standards (R. 3).

In addition, each petitioner was informed that after completion of the examination on his initial assignment he would have to take and pass periodic examinations (usually annual) on sections of the scheme assignment. (*Ibid.*)[4] Passing of these examinations, called "case examinations," was necessary for the

[3] General schemes are printed lists of all post offices in a State showing how each office is supplied by mail. A city scheme is a list indicating the routing of city mail to carriers, box sections, stations, and branches.

[4] The court below noted (Pet. App. 29, fn. 1) that:

"Although sufficient distributing clerks are absolutely essential to the establishment and maintenance of an efficient postal service and although periodic examinations appear to be, after long years of trial and experience, the only way to insure proficiency, nevertheless the Post Office Department has narrowed the otherwise mandatory requirement of examination passing so that:

"(1) Clerks not called upon to perform any distribution except during the Christmas period should be given a simple

employee's retention of his distributing clerk's job (R. 4).[3] In order to pass a case examination, each employee, of course, had to engage in a certain amount of study, depending upon his memory, ability, and practice in the use of the schemes.[4]

The study is not authorized to be performed "on the clock," *i. e.*, during the employee's 8-hour tour of duty

---

primary scheme of distribution, such as is furnished temporary employees for study incident to handling Christmas mails. * *. * These employees should be relieved of any other scheme requirements during the remainder of the year. Manual of Instructions for Postal Personnel (1948) Chapt. III, Art. 55 (d).

[4] "(2) No clerk shall be examined on any scheme that he is not required to use regularly, either daily, monthly, or at seasonal or peak periods, except that this shall not apply to clerks or substitutes who may be preparing for such assignment. No clerk shall be examined more than once each year on a scheme on which he has qualified." Manual *Op. cit.*, *supra* (e).

"(3) Clerks past 55 years of age, or who have been in the service for 25 years, are exempt from examinations, but any distributor who permits himself to become inefficient in the performance of his duties shall be required to qualify again by passing a satisfactory scheme examination. Manual *Op. cit.*, *supra* (j)."

[5] Manual of Instructions for Postal Personnel (1948), Appendix A, Art. 59.

[6] The petition erroneously asserts that there is no disagreement as to the fact that study for scheme examinations "* * * was difficult and time consuming, requiring the highest degree of concentration and persistence" (Pet. 21). On the contrary, as was pointed out to the court below, knowledge of distribution schemes required is comparatively simple and "once a clerk has completed his study of the schemes necessary for the separation of mails distributed by him, examinations on the schemes are required only once a year. As the scheme of distribution normally follows the actual dispatch of mail distributed by the clerk each day, little additional study is necessary to prepare for the scheme examination." (R. 38.)

at his job (R. 4).[7] By the same token, neither compensatory time, nor straight time pay, nor time and a half pay has been or is being paid to employees for their home study for case examinations.

ARGUMENT:

The Court of Claims has rejected petitioners' attempt to obtain overtime compensation for time spent by them, in their own homes, studying for case examinations. It is clear beyond question that compensation for such study is not authorized by the Act of July 6, 1945, *infra*, p. 13, relied upon by petitioners, or any other statute. The decision of the Court of Claims is plainly right and presents no conflict with any other court decision. Further review by this Court is unnecessary.

1. The Act of July 6, 1945, *infra*, p. 13, is essentially an *in haec verba* repetition of its predecessor statute—

[7] Petitioners assert (Pet. 13, 25, 26) that post offices, other than those in which they are employed, pay employees, similarly situated, for "on the clock" scheme study. The plain fact is that the Postmaster General, acting under the authority of R. S. 396; 42 Stat. 25, "to instruct all persons in the Postal Service with reference to their duties," has instituted, at a few post offices, for new or substitute employees only, an "experimental supervised on-the-clock scheme study program * * * to determine the feasibility of the current method of learning schemes" (R. 26). It is apparent that such experimentation with "on the clock" study periods, instituted under the authority of R. S. 396 and entirely discretionary on the part of the Postmaster General, is irrelevant to the problem of whether the Act of July 6, 1945, provides pay for at-home study.

the Act of February 28, 1925, 43 Stat. 1053, 1059.[8] That Act had been uniformly construed by the Post Office Department and the Comptroller General to provide for the payment of overtime only where an employee, in time of emergency or because of the needs of the service, worked on the job in excess of eight hours and not to provide for overtime where the employee studied for case examinations "off the clock."

In *Deland* v. *United States*, 77 C. Cls. 55, the Court of Claims, rejecting a comparable claim for compensation for at-home scheme study, upheld the administrative construction of the statute. Prior to the *Deland* decision in 1933, there had been introduced in Congress some five bills to require the Post Office Department to provide "on the clock" time for case examination study or to provide pay for such study.[9]

[8] The 1925 Act, 43 Stat. 1058, 1059, provided:

"* * * [I]*n cases of emergency, or if the needs of the service require*, and it is not practicable to employ substitutes, *special clerks, clerks, and laborers, in first and second class post offices and carriers in the City Delivery Service can be required to work in excess of eight hours per day, and for such overtime service they shall be paid* on the basis of the annual pay received by such employees * * *." (Emphasis supplied.)

The 1945 Act here involved (59 Stat. 435) provides:

"*In emergencies or if the needs of the service require, employees may be employed in excess of eight hours per day and for such overtime service they shall be paid* on the basis of 150 per centum of the annual rate of pay received by such employees * * *." (Emphasis supplied.)

It will be observed that the wording of the two statutes, insofar as the statutes define the terms and conditions for the payment of overtime, is the same.

[9] H. R. 4846, 68th Cong., 1st Sess.; H. R. 5018, 69th Cong., 1st Sess.; H. R. 7457, 70th Cong., 1st Sess.; H. R. 6796, 71st Cong., 2d Sess.; H. R. 444, 72nd Cong., 1st Sess.

Congress, well aware of the consistent administrative interpretation of the pay statutes insofar as scheme study was concerned, and also aware of the expense to the Government of either type of bill, had refused to enact them. Declining to accomplish judicially that which had been denied by Congress, the Court of Claims in *Deland* observed:

> * * * The post office had authority to require him to pass examinations for the purpose of determining whether he was qualified to fill the position. The law applicable to the case has been in force many years and under it compensation has always been denied for such work as that for which plaintiff now demands pay. Proposals have been made to modify the law and the attention of Congress has been called to the practice of the Post Office Department, but Congress has refused to take any action. We think the action of the Department and the ruling of the Comptroller General are in accordance with the proper construction of the statutes applicable to the question involved, and if there were any doubt about the matter it has been removed by long continued practice during which period Congress has refused to modify the law. [*Deland* v. *United States*, 77 C. Cls. 55, 56–57.]

From the time of the *Deland* decision until passage of the Act of July 6, 1945, there were introduced seven other bills aimed at providing either pay or "on the

clock" time for ease examination study.[10] These bills also failed of passage.[11]

In the light of the *Deland* decision, and the continuing refusal of Congress, fully aware of the demands, to provide compensation for scheme study, it is difficult to see how petitioners can seriously argue that the Act of July 6, 1945, an *in haec verba* repetition of the 1925 Act (see fn. 8, *supra*, p. 6), was intended to establish, by its general terms, this novel fiscal obligation on the part of the Government. Surely, if Congress, in passing the Act of 1945, wished to change the well recognized construction of its terms and provisions, and to provide therein for a tremendously increased governmental obligation,[12] it would have done so by the use of clear and plain language. See *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196. On the other hand, where a statutory provision, such as the provision of the 1925 Act defining the terms and conditions for the

[10] H. R. 1707, 73rd Cong., 1st Sess.; H. R. 45, 74th Cong., 1st Sess.; H. R. 4647, 75th Cong., 1st Sess.; H. R. 995, 76th Cong., 1st Sess.; H. R. 2760, 77th Cong., 1st Sess.; H. R. 68, 78th Cong., 1st Sess.; H. R. 465, 79th Cong., 1st Sess.

[11] Similarly, eight bills introduced since the Act of July 6, 1945, have failed to succeed. See H. R. 98, 80th Cong., 1st Sess.; H. R. 246, 81st Cong., 1st Sess.; H. R. 127, 82nd Cong., 1st Sess.; H. R. 1416, 83rd Cong., 1st Sess.; H. R. 1425, 83rd Cong., 1st Sess.; H. R. 81, 83rd Cong., 1st Sess.; H. R. 183, 84th Cong., 1st Sess.; H. R. 543, 84th Cong., 1st Sess.

[12] There is no way of estimating the expense to which the Government would be subjected if petitioners' theory were to prevail, for there would be no way of checking or controverting the various home study figures submitted. The cost of providing "on the clock" compensation—which *could* be subject to check and supervision—has been estimated by the Post Office to be as high as $37,000,000 a year (R. 37).

payment of overtime, has been accorded a consistent administrative or judicial interpretation and the statutory provision is reenacted without material change, the administrative or judicial interpretation must be deemed to have received legislative approval. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552.

2. Equally without merit is petitioners' assertion that support for their theory can be found in cases, involving claims by non-federal employees, decided under the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended.

That Act, as construed recently by this Court in *Mitchell* v. *King Packing Co.*, 350 U. S. 260, and *Steiner* v. *Mitchell*, 350 U. S. 247, requires payment for certain time spent by employees *on the premises of their employer*. In *Steiner* the Court held that employees working with caustics and toxic material and compelled to take showers *on the employer's premises* were entitled to be paid for the time spent in changing and washing. The *King Packing* case denominated as a part of their principal activities (and hence compensable) time spent by employees *on the employer's premises* in sharpening the knives with which they worked. To the same effect are *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, and *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 325 U. S. 161, both cases holding compensable the time spent by miners in underground travel in their employers' mines. In some few cases, work performed at home or off the employer's premises was held to be compensable but only where (1)

the employee brought in tangible evidence of having worked (*i. e.*, bookkeeper's reports, *Barker* v. *Georgia Power & Light Co.*, 1942, 2 W. H. Cases 486, and reporter's reviews of motion pictures, *Republican Publishing Co.* v. *American Newspaper Guild*, 172 F. 2d 943 (C. A. 1)) or (2) the employee was in a place or area either under employer supervision or where his attendance could be noted (*i. e.*, attending conferences and employer's school of instruction, *Chepard* v. *May*, 71 F. Supp. 389 (S. D. N. Y.)):

Plainly, the Fair Labor Standards Act and the cases decided thereunder, apart from the fact that they are inapplicable to federal employment, offer no support for petitioners' claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
SEYMOUR FARBER,
Attorneys.

JULY 1957.

APPENDIX

Section 1 of the Act of July 6, 1945, 59 Stat. 435 (39 U. S. C. 851) provides:

> The term "employees" wherever used in this Act shall include officers, supervisors, special-delivery messengers in offices of the first class, and all other employees paid from field appropriations of the Postal Service, other than postmasters, skilled-trades employees of the mail-equipment shops, job cleaners in first- and second-class post offices, and employees who are paid on a fee or contract basis.

Section 2 of the Act of July 6, 1945, 59 Stat. 435, (39 U. S. C. 852) provides:

> Employees shall be required to work not more than eight hours a day except as provided in section 4. The eight hours of service shall not extend over a longer period than ten consecutive hours, and the schedules of duty of the employees shall be regulated accordingly: *Provided*, That the provisions of this section shall not apply to employees of the Railway Mail Service and the Air Mail Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; employees in third-class post offices; employees paid on an hourly basis; employees not in the automatic or additional annual salary grades; and carriers in the Village Delivery Service: *Provided further*, That any classified substitute employee who reports for duty at any post office or other postal unit in compliance with an official order shall be employed not less than two hours following the hour at which such classified substitute employee is ordered to report. Employment in any branch

of the Postal Service will be construed as compliance with this proviso.

Section 3 of the Act of July 6, 1945, 59 Stat. 435, as amended (39 U. S. C. 853) provides:

(a) When the needs of the service require employees, to perform service on Saturdays, Sundays, or holidays, such employees shall be allowed compensatory time for such service on one day within five working days next succeeding the Saturday or Sunday and within thirty days next succeeding the holiday.

(b) If the service so performed on Saturdays and Sundays is less than eight hours, such service may, in the discretion of the Postmaster General, be carried forward and combined with similar service performed on other Saturdays and Sundays, and such employees may be allowed compensatory time for such combined service or any part thereof at any time, except that, whenever at least eight hours of such service has been accumulated, such employees shall be allowed eight hours compensatory time on one day within five working days next succeeding the Saturday or Sunday on which the total accumulated service was at least eight hours.

(c) The Postmaster General may, if the exigencies of the service require, authorize the payment of overtime to employees other than supervisory employees whose base salaries, exclusive of longevity salary, are more than $4,970 per annum, for services performed on Saturdays, Sundays, and Christmas Day during the month of December, in lieu of compensatory time.

(d) Supervisory employees shall be allowed compensatory time for services performed in excess of eight hours per day, and those whose base salaries, exclusive of longevity salary, are more than $4,970 per annum shall be allowed compensatory time for services performed on

Saturdays, Sundays, and on Christmas Day during the month of December, within one hundred and eighty days from the days such service was performed.

(c) The provisions of this section shall not apply to employees in the Postal Transportation Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; clerks in third-class post offices; and employees paid on an hourly basis.

Section 4 of the Act of July 6, 1945, 59 Stat. 435 (39 U. S. C. 834) provides:

> In emergencies or if the needs of the service require, employees may be employed in excess of eight hours per day and for such overtime service they shall be paid on the basis of 150 per centum of the annual rate of pay received by such employees. In computing compensation for such overtime employment, the annual salary or compensation for such employees shall be divided by two thousand and eighty, the number of working hours in a year. The quotient thus obtained will be the base hourly compensation and one and one-half times that amount will be the hourly rate of overtime pay: *Provided*, That the provisions of this section shall not apply to employees of the Railway Mail Service and the Air Mail Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; employees paid on an hourly basis, and supervisory employees.

Chapter III, Art. 55 of the Manual of Instructions for Postal Personnel [1948] provides:

> CASE EXAMINATIONS
>
> 55. Case examinations shall be given on official time as follows:
>
> (a) At offices of the first class having a superintendent of mails, all clerks regularly

assigned to the distribution of mail, either incoming or outgoing, and all substitute clerks, shall be examined yearly on the distribution schemes in use in their offices. Such examinations shall be conducted by the superintendent of mails. On outgoing mail a scheme comprises a State or section of a State, in accordance with divisions made by the Railway Mail Service. On incoming mail a scheme comprises a city primary, a city secondary, or a station distribution. Where a State or city is divided into two or more sections, one section will constitute a complete scheme for examination purposes. Complete city schemes of more than 1,200 cards shall be divided into sections, each section to contain not less than 600 cards.

(b) At city delivery offices all substitute clerks should be assigned to and must qualify on the city scheme, and all clerks in the mailing division, other than those regularly assigned to scheme distribution and those needed as reserves for such scheme distribution of outgoing mail, must qualify on the city delivery scheme. A scheme assignment on the distribution of outgoing mail is the State or States the mail for which a clerk may be required to distribute. An assignment on incoming mail may embrace a primary distribution, and one or two section or station distributions, or, where there is no primary, two or three section or station distribution. An assignment may embrace both incoming and outgoing distribution. Upon being given an assignment, a clerk shall as a rule be required to qualify on one scheme each 3 months until he shall have covered his entire assignment, after which he shall be required to pass at least one examination annually, provided that an entire assignment must be covered within 3 years. At offices where the needs of the service demand, additional examinations may be required. At offices having a superintendent of mails, in cases where a standpoint

scheme is regularly used the examination should be based thereon if feasible, the scheme to be made up by the superintendent of mails and approved by the general superintendent or district superintendent of the Railway Mail Service.

(c) Clerks in the registry section shall qualify on either the outgoing or city scheme, their assignment to govern the examination given. Nondistribution employees whose services are not required or utilized in a distributing capacity at seasonal or peak periods of the day, month, or year shall not be required to qualify or pass examination on any scheme. However, where the services of such employees are utilized and where it is practicable to use their services in distribution work during seasonal or peak periods of the day, month, or year, they shall be required to qualify on the city primary or part of the city delivery scheme.

(d) Clerks not called upon to perform any distribution except during the Christmas period should be given a simple primary scheme of distribution, such as is furnished temporary employees for study incident to handling Christmas mails. They should be furnished with such primary schemes in November and be required to qualify thereon about December 1 of each year. These employees should be relieved of any other scheme requirements during the remainder of the year.

(e) No clerk shall be examined on any scheme that he is not required to use regularly, either daily, monthly, or at seasonal or peak periods, except that this shall not apply to clerks or substitutes who may be preparing for an assignment. No clerk shall be examined more than once each year on a scheme on which he has qualified.

(f) At first-class offices not having a superintendent of mails, all clerks, including assistant postmasters who distribute mail 1 hour or

more daily, in accordance with a general scheme prepared by the Railway Mail Service, or who from time to time are assigned to assist in such distribution during rush hours or periods of congestion, shall be examined once yearly on the distribution schemes in use in their offices. Such examinations on dispatching schemes shall be conducted by district superintendents of the Railway Mail Service, and on city schemes by the postmaster or assistant postmaster.

(g) At second-class offices examinations on dispatching schemes will be conducted by district superintendents of the Railway Mail Service when conditions indicate that clerks, including assistant postmasters, who distribute mail 1 hour or more daily, in accordance with a general scheme prepared by the Railway Mail Service, or who from time to time are assigned to assist in such distribution during rush hours or periods of congestion, should have some knowledge of dispatching scheme distribution. Clerks shall be examined once yearly on the schemes at the times designated by the district superintendents. Examinations on city schemes, if necessary, shall be conducted by the postmaster or assistant postmaster.

(h) A record of 95 percent and an average of not less than 16 cards correctly thrown per minute on case examinations shall be required. Clerks making lower grades shall be demerited in accordance with the schedule shown in the "Postal Service Rating System" and reexamined, and those failing upon the fourth trial may be considered for removal. Clerks who fail to qualify should, as a rule, be allowed 30 days in which to prepare for reexamination. Clerks who fail to report for examination on the date scheduled should be demerited and rescheduled without further opportunity to prepare for examination.

(i) The speed and percentage attained in case examinations shall be recorded separately on Form 3989, in duplicate, the carbon copy of the form being sent to the employee and the original being filed in the employee's individual record jacket.

(j) Clerks past 55 years of age, or who have been in the service for 25 years, are exempt from examinations, but any distributor who permits himself to become inefficient in the performance of his duties shall be required to qualify again by passing a satisfactory scheme examination.

(k) Postmasters shall see that there are a sufficient number of trained distributors available to meet any situation which may arise, and good judgment should be exercised not to require clerks to qualify on schemes which they will not be required to use.

(l) Careful attention should be given to the training of substitutes to become good distributors, and they shall not be exempt from examinations.

Appendix A, Art. 59 of the Manual of Instructions for Postal Personnel [1948] is the schedule of demerits for "Offenses Against Discipline and General Delinquencies". In pertinent part, it provides:

Case Examinations

Failure to report when due, failure to be prepared or to qualify on first attempt	50
Second failure	75
Third failure	125
(Failure on more than three occasions may result in charges looking to removal.)	

U. S. GOVERNMENT PRINTING OFFICE 1952